



DEPARTMENT OF JUSTICE

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December 12, 2000

Director Rasmussen
Department of Human Services
Hoover Bldg.
LOCAL

Re: Paul Cote contract

On November 21, 2000, you requested I review the audit conclusions regarding the above, and take appropriate action. In addition to the Auditor's Report dated August 28, 2000, I have reviewed:

- A "Chronology of Events re Paul Cote Contract", prepared by you
- Pre-contract questionnaire and contract including addendum for 4-4-99 to 6-30-99
- Pre-contract questionnaire and contract for 7-1-99 to 10-1-99
- Pre-contract questionnaire and contract for 10-2-99 to 2-4-00
- Pre-contract questionnaire and contract for 2-5.00 to 6-30-00
- Request for Exception to State-Wide policies and approval 4-12-99
- Request for Exception to State-Wide policies and approval 7-23-99

At the outset, an issue of privilege must be addressed. This letter containing legal analysis and conclusions is ordinarily a confidential attorney client communication. As you know, the Oversight Committee of the Legislature, through Ms. Beth Lenstra, LFB, has requested a copy. With knowledge of that request, and my intent to honor it, subject to the attorney-client privilege, you have expressly waived that privilege, and approved its dissemination to the committee.

The Report

I believe the Auditor's Report is a fair and reasonable recitation of the facts and circumstances concerning the 'Cote contract'. I am further in agreement with many of the comments and recommendations regarding the contracting process at the DHS. Many

of those recommendations are being addressed by the DHS with the assistance of the staff of the Attorney General, when requested.

My charge was to determine whether and in what manner a claim, for what the Auditor identified as a \$54,127 overpayment on contracts through June 30, 2000, could be maintained. You have requested that repayment from Mr. Cote, based on the Auditor's recommendation, but to date Mr. Cote has only verbally responded that he will repay what he owes. I take it as my task to determine what he owes, if anything, and to follow that with appropriate action, if any.

The Written Contract

As an independent contractor with the Department, Mr. Cote is entitled to receive the benefits of his bargain as described in his consulting contract, but no more. The overpayment found by the Auditor is attributable to reimbursement for travel and lodging expenses incurred while performing the consulting work described in the Scope of Services section of the various contracts. Because the contracts through 6-30-00 are silent on this reimbursement, and also contain a maximum payment, which is exceeded when the expense reimbursement is added to the contract fee, the overage is determined to be an overpayment by the Auditor.

Any legal obligation to repay, must be in this instance be based upon a claim of breach of the contract, or money paid in error which gives rise to an obligation to repay. It is the terms of the contract, which determine the enforceability of the obligation. Terms which give rise to an arguable claim include:

- W. **Integration.** This Contract represents the entire Contract between the parties and neither party is relying on any representation that may have been made which is not included in this contract.
- X. **Supersedes Former Contracts or Agreements.** This Contract supersedes all prior Contracts or Agreements between the Department and the Contractor for services and products provided in connection with this Contract.
- P. **Amendments.** This Contract may be amended in writing from time to time by mutual consent of the parties. All amendments to this Contract must be fully executed by both parties.

The section entitled "Scope of Services" defines the work for which the independent contractor has been engaged, and Section 5.0, entitled "Compensation", specifies the maximum payment for those services as defined. That compensation, while different for each of the four contracts examined, nevertheless is consistently described as a "not to exceed" amount, and no mention is made as to reimbursement for expenses. In addition, in the Pre-contract questionnaire, dated 4-4-99, and signed by Mr. Cote, question No. 8 is answered in the negative: "Is the worker reimbursed by the State Agency for any of these expenses?"

There is an "Addendum to the Consultant Agreement" which on page three, purports to exclude "expenses" from the term "compensation." The "Addendum" however is dated March 29, 1999, which precedes the date of the Contract, April 4, 1999, or the date of your signature on the Pre-contract questionnaire, April 13, 1999, and is not executed by either party. The "Addendum" would appear to be ineffective to amend the contract under the provisions of paragraphs W, X and P, above cited.

If Mr. Cote made a claim for reimbursement of unpaid expenses under this contract, I believe these facts would present an arguable defense to such a claim. However, because of the ambiguity engendered by these and additional facts, I do not believe litigation against Mr. Cote for reimbursement of expenses paid would succeed. I do not believe that there is a legal obligation of Mr. Cote enforceable by the State. Mr. Cote did not breach any contractual obligation under which he was bound.

The Oral Agreements

Those additional facts include the April 12, 1999 and September 24, 1999 approvals of a Request for Exception to State-Wide Policies, signed by the Department of Revenue and Finance. In both instances, direct billing of airfare and lodging with no limits indicated, was approved. Further, as you have indicated in the Chronology, you and Mr. Cote contemplated during pre-contract discussions that the fee for services performed was exclusive of air travel and lodging, which costs, both parties agreed, would be billed directly to "the State". Your request for that was approved, twice.

He performed the "Scope of Services" for the "Compensation" described. Your testimony would confirm the parties' understanding that the reimbursement of those expenses would be outside the contract amount, and direct billed to the State, would corroborate that of Mr. Cote, and is supported by the IDRF documents. Throughout the contract period, the expenses were billed directly to the State, and paid without objection.

Although the Integration clause, paragraph W, would appear to block consideration of any evidence of this oral agreement between you and Mr. Cote, the silence of the contract itself as well as the collateral documents which confirm your agreements, would most likely permit the introduction of this parol evidence. If admitted, it is unlikely that the State could prevail on its claim.

That is not to say that Mr. Cote is not obligated to repay an overpayment. Comparing the maximum compensation of the contract with those amounts paid according to Exhibit A of the Auditor's Report, Mr. Cote received \$1556 in excess of the maximum for the period 7-1-99 to 10-1-99. That amount should be repaid, and in reliance upon Mr. Cote's assurance to you that he will pay what he owes, I would encourage you to request that immediately. Please notify me if that payment is not made for any reason.

Sincerely,

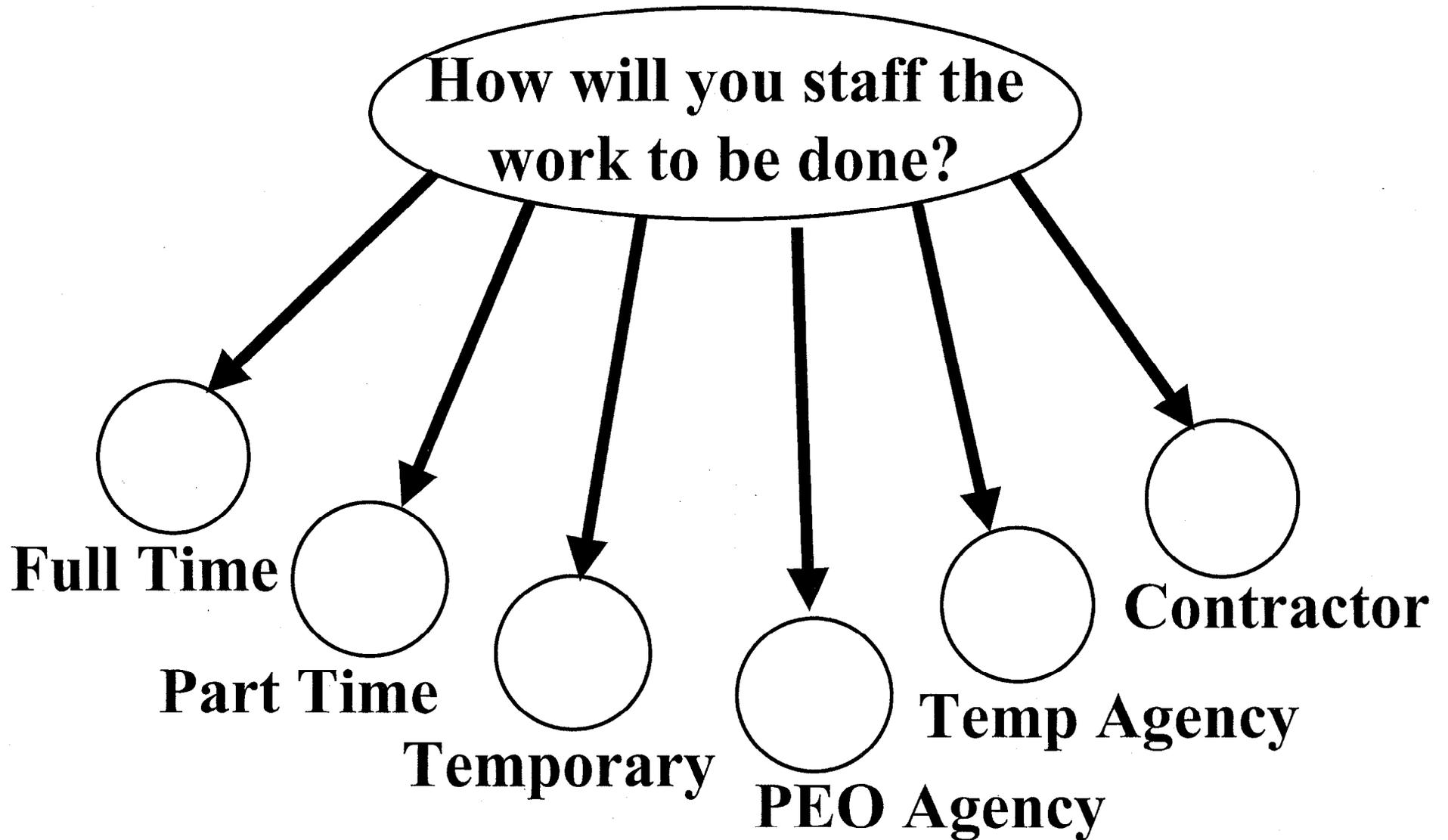
Gordon E. Allen
Deputy Attorney General

Copy: Beth Lenstra for dissemination to Oversight Committee

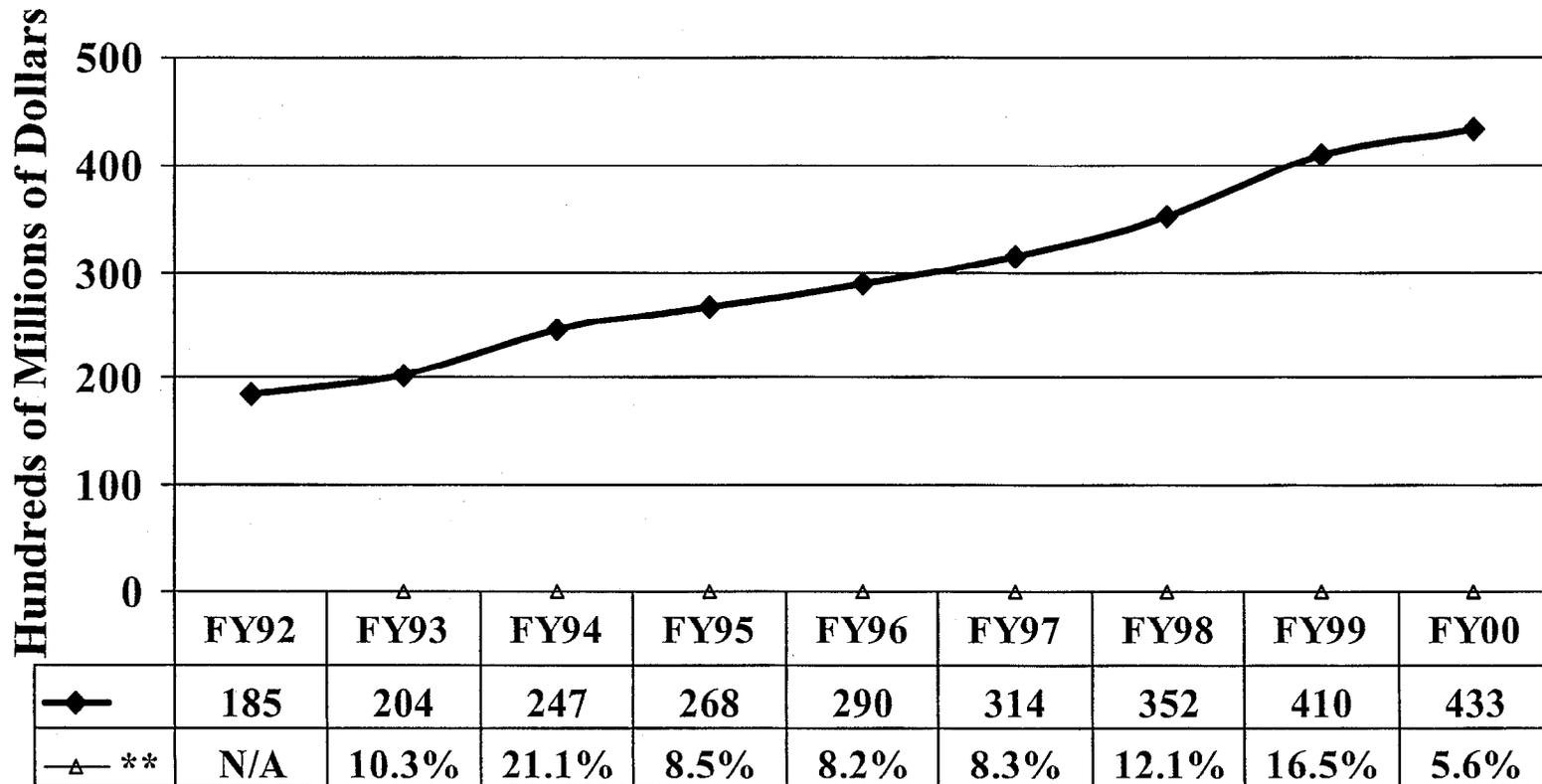
#	Services Contracting Projects	Responsibility	Steps/Elements	Expectations
1	Develop a contract bidding, monitoring and management system to assist policymakers in proper contracting. Strengthen internal controls. Review/revise the current Personnel Services Contracting Guidelines, including the "optional" nature of bidding and "sole source" documentation.	DRF DGS DOM Auditor IDOP AG Lead: Eldon Sperry	What should the process look like? What is optimal? What should be required? Optional? Develop different levels of monitoring based on contract value? Include policies, standards, internal controls, evaluation and documentation thresholds.	1. Revise and expand guidelines and standards for agencies to follow for entire contracting cycle. 2. Develop interim improvements to address immediate concerns and reduce immediate risks.(DONE)
2	Develop a training program to cover the "A to Z" of contracting including: ⇒ What are the elements of contracting? ⇒ When to contract ⇒ When to solicit bids ⇒ How to prepare and evaluate an RFP ⇒ How to negotiate contract terms ⇒ How to write contract language with performance measures ⇒ How to monitor and evaluate contractors/contracts ⇒ How to contract for results ⇒ How to conduct a cost-benefits analysis	IDOP DRF DGS DOM AG Auditor Lead: Cathy Mallard	1. Review current PDS course <ul style="list-style-type: none"> • What is the class content? • Who has enrolled in the past? • Who conducts training? 2. Should training be mandatory for those with contract management responsibility? 3. IDOP will take lead on contacting entities to redesign the training once the new guidelines are complete (see Project #1).	1. Review current PDS course for modifications to compliment the interim changes in Services Contracting Guidelines (See Project #1). 2. Full course development after final completion of Project #1.
3	Review the Legislature's FTE cap policy.	DOM Lead: Cindy Eisenhauer	Discuss how to deal with FTE caps and how to manage dollars to ensure the most cost effective staffing decisions. Explore flexibility to do mid-year FTE cap adjustments.	Contact LFB to start discussions.

4	Develop tools to assist state agencies in considering staffing alternatives for getting work done and then selecting the most cost-efficient and best situation-specific method available	IDOP Lead: Clint Davis	Decision Guide <ul style="list-style-type: none"> Send Decision Guide to services contracting committee members Include with Services Contracting training (see Project #2). Meet with departments to review Decision Guide Review Auditor's Pre-Award Survey 	<ol style="list-style-type: none"> Send Decision Guide to committee members for review and comment.(DONE) Schedule meetings with departments to review Guide.(DONE) Contact Auditor's office for copy of Pre-Award survey.
5	Establish annual contracting reporting from departments to the Governor	DGS, DRF, IDOP Lead: Patti Schroeder	<ul style="list-style-type: none"> What analysis will be expected? Who will issue the report? 	Develop work plan, timeline, and preliminary scope/content of report and training.(DONE)
6	Redesign compensation system to make state salaries, rewards and salary progression more competitive	IDOP DOM Lead: Clint Davis	Develop a plan to redesign the compensation system to make state salaries more competitive. Address pay for performance, pay plan equity and pay compaction.	<ol style="list-style-type: none"> Send plans to Governor for review and comment.(DONE) Present plans to department directors.
7	Address services contracting in the "Accountable Government Act"	DOM Lead: Cindy Eisenhauer	Develop of a legislative proposal that includes how government services contracting will become more accountable.	<ol style="list-style-type: none"> Discuss with Accountable Government Team.(DONE) Develop legislative proposal.(DONE)
8	Explore a "Temporary Project Worker employment status	IDOP Lead: Clint Davis	Research policies and laws from other states.	Develop a proposal based on research outcome.
9	Establish a services contracting "Best Practices" information base	IDOP Lead: Clint Davis	Solicit ideas from national groups, e.g., NASPO, NASACT, and NASPE. Send questionnaire via email listserves.	<ol style="list-style-type: none"> Develop survey questions. (DONE) Analyze data from survey questions. Organize and conduct "Best Practices" group meetings.
10	Evaluate application of ERP to contract monitoring	DRF DGS Lead: Eldon Sperry	Investigate whether there will be modules within the ERP system to facilitate contract monitoring.	Summarize extent to which current ERP design accounts for services contracting.(DONE)
11	Revise accounting system object codes and classes in 405 and 406	DRF Lead: Cal McKelvogue	DRF will take the lead in forming a work group to address needed changes in the state's accounting codes.	Accounting codes will be updated and specified such that data and reports will more accurately reflect contracting expenditures and report generation will be easier/quicker.

Staffing Alternatives



Contractor Expenditures*



* Total payments to services contractors (405 & 406)

** Percentage growth from previous year

Does not include Regents, Community Based Corrections or the Fair Authority

Iowa Department of Personnel

Revised September 15, 2000